86-882

No. 86-_____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

*Petitioners*,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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35 pp

## QUESTIONS PRESENTED

Petitioners seek a writ of certiorari before judgment, and argument in tandem with *Hartigan v. Zbaraz*, No. 85-673 review granted, jurisdiction postponed, October 14, 1986. Petitioners[1] seek to have this court review a district court decision invalidating a Minnesota criminal abortion statute similar to the statute before this Court in *Zbaraz*. A principal difference between the instant case and *Zbaraz* is that this case was decided following a trial on the effect of the statute after five years of operation,[2] whereas *Zbaraz* is a facial challenge to a statute that has never gone into effect. The following questions would be raised in this writ:

1. Whether the district court erred in holding that *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983) precludes invalidation of the Minnesota parental notification judicial bypass statute as unconstitutional in its entirety, despite factual findings that after five years of operation it was substantially burdensome, failed to promote any state interests, and, in fact, undermined family integrity, communication, and privacy interests for many minors.

2. Whether the district court was correct in holding that the imposition of a mandatory 48 hour waiting period

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1 Hereinafter, all parties will be referred to by their designation in the district court. Petitioners (appellees in the Eighth Circuit) will be denominated "plaintiffs" and the respondents (appellants in the Eighth Circuit) "defendants" or the "State."

2 Minn. Stat. § 144.343(2)-(7), a criminal statute requiring two parent notification and a 48 hour waiting period prior to any minor's abortion with a judicial bypass, went into effect August 1, 1981. Between February 10, and March 13, 1986 there was a trial on the constitutionality of the statute which was enjoined on November 6, 1986. The district court held the requirement of notice to both biological parents was unconstitutional facially and as applied. (142a-151a.) (Citations to the record are contained in plaintiffs' separate Appendix and will be referred to as ____a.)

after constructive mailed notification to both parents before any abortion could be performed was unconstitutional.

3. Whether the district court was correct in holding unconstitutional a requirement that both biological parents be notified prior to a minor's abortion, regardless of whether they had ever married, or were separated or divorced, unless the minor obtained an order from a state court, and that the statutory definition of parent was not severable.[3]

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3 All three of these questions are listed, in slightly different form, in the State's listing of the issues on appeal filed in the Eighth Circuit on November 18, 1986. (140a-141a.)

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IN THE

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OCTOBER TERM, 1986

**No. 86-**

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JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

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THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

*Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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### OPINION BELOW

The opinion of the district court was issued on November 6, 1986 and is not reported. (34a-137a.)

## JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari of a "cas[e] in "a court of appeals "before . . . rendition of judgment or decree." Under 28 U.S.C. § 2101(e), a petition for certiorari before judgment has been rendered is timely "at any time before judgment." The defendants below filed and docketed their appeal in the Eighth Circuit Court of Appeals on November 18, 1986, No. 86-5423. The plaintiffs below docketed their cross appeal in the Eighth Circuit Court of Appeals on November 24, 1986.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Minnesota Statute § 143.343 (2)-(7) at issue in this case is reprinted in full in the Appendix. (142a-151a.)

## STATEMENT OF THE CASE

### A. History of Legislation

In April, 1981, the Minnesota legislature enacted Minn. Laws 1981 ch. 228, codified as Minn. Stat. § 144.343 (2)-(7).[4] This statute imposes civil and criminal penalties for performing an abortion on an unemancipated minor unless both of her parents are notified in advance. (146a-147a.)[5] The two parent

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4 The statute was an amendment to the Minors' Consent to Health Services Act, passed in 1971, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse § 144.343(1). (143a.) The health professional is permitted to inform parents only where failure to inform would jeopardize the minor's health. Minn. Stat. § 144.346. (151a.)

5 The exceptions to the two-parent notice requirement are where written consent is given, § 144.343(4)(b) (146a), the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c) (*id.*), or the physician certifies the minor's life is endangered and there is no time for notice, § 144.343(4)(a). (145a-146a.)

notice applies even where parents have never married, or are divorced or separated, as well as where there is an order of protection against an abusive spouse because of existing patterns of physical violence in the family. After mailed notice, a 48 hour waiting period is imposed with the time running from 12:00 the day after mailing or from 12:00 the next regular mail day. § 144.343(2)(b). (144a.)

Minn. Stat. § 144.343(6) provides that if subdivision 2 of the statute is ever judicially enjoined, the statute will be enforced by incorporation of the judicial bypass provisions in subsection 6, permitting a minor to go to state court for an order allowing her to have an abortion without notice either because she is "mature and capable of giving informed consent" or because an abortion without notice to both her parents would serve her "best interests." (147a-150a.)[6]

The district court found that the purposes of the Minnesota legislature in enacting this amendment were both to achieve several assumed salutary effects by encouraging parental discussion, and to deter and dissuade minors from having abortions altogether. (68a.)[7]

## B. History of the Litigation

Plaintiffs consist of a class of mature minors seeking abortions in Minnesota without involvement of one or both their parents, a divorced mother who supports her minor daughter's abortion decision and fears notice to her ex-spouse, four medical clinics in Minnesota which together perform nearly all

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6 The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court, (§ 144.343(6)(c)(ii)) (149a), for confidentiality and expedition in processing (§ 144.343(6)(c)(iii)), (149a), for expedited appeal and for access to the trial courts 24 hours a day, seven days a week (§ 144.343(6)(c)(iv)). (150a.)

7 The groups supporting this bill in the legislature were anti-abortion groups (171a-172a); in contrast, major medical, public health, and youth groups opposed the bill, including Minnesota Medical Association, Minnesota Public Health Association, Lutheran Social Services, American Association of University Women and others. (173a.)

the abortions in the state, and two physicians who provide abortion services for their minor patients. Defendants are the State of Minnesota, its Governor and Attorney General. (40a.)

Plaintiffs challenged the statute before it was implemented on the ground that facially and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. (4a.) On July 31, 1981, subdivision 2 requiring two parent notice without a bypass was temporarily enjoined; but § 144.343(2)-(6), notice with a judicial bypass procedure, was permitted to go into effect on August 1, 1981.[8] On January 23, 1985 the district court granted in part defendants' motion for summary judgment, but denied the motion on plaintiffs' claims that Minn. Stat. § 144.343(2)-(6) was unconstitutional as applied. (32a.)

Trial on the merits took place between February 10, 1985 and March 13, 1986. During trial the Court heard from seventy-five witnesses, including the Minnesota state court judges who collectively had heard over ninety percent of all the minors' judicial bypass petitions over the five years the statute was in operation, public defenders, guardians *ad litem* for the minors, physicians and counselors whose medical care for minors had been affected by the law, epidemiologists, experts in adolescent development and family communication, psychiatrists with clinic practices encompassing pregnant minors, twenty-four members of the minor class and four single parents or family members of pregnant minors.

The district court made extensive findings of fact concluding that this statute imposed a substantial burden on teenagers. The court there held that neither forced notice nor the judicial bypass "serve[d] the State's asserted interest in fostering intra-family communication and protecting pregnant minors" (111a), and in fact undermined family communication and involvement in some cases. (65a.) The burden of obtaining a

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8 On March 22, 1982 a preliminary injunction was issued as to Section 2 but denied as to § 144.344(2)-(6) the notice with a judicial bypass. (43a.)

judicial waiver was found to fall on a group composed almost entirely of mature or best interest minors. (112a.)

The district court stated that were it writing on a clean slate, § 144.343(2)-(6) would be unconstitutional because it failed to accomplish any state interests and unduly burdened minors. However, the court held *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983), precluded judicial review of the statute in its entirety and left the court with discretion only to review issues of statutory construction. (116a.) Although there was no proof that the 48 hour waiting period facilitated any parent/child communication, the district court ruled that *H.L. v. Matheson*,[9] 450 U.S. 398 (1981), precluded a holding that waiting periods are unconstitutional per se. The court, however, invalidated the 48 hour waiting period as excessively burdensome. (131a.)

The district court found the two parent requirement substantially burdensome and invalidated the two parent requirement facially and as applied, and enjoined the entire statute because of the inseverability of this requirement. (135a-136a.)

On November 18, 1986 defendants filed and docketed an appeal in the Eighth Circuit Court of Appeals. (138a-141a.) On November 24, 1986 plaintiffs filed and docketed their cross-appeal in the Eighth Circuit.

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9 In *H.L. v. Matheson*, 450 U.S. 398 (1981) the Supreme Court found H.L. to be an "immature" not "best interests" minor only because no proof was offered in the trial court either as to her maturity or as to the reasons she could not notify her parents. *H.L.*, 450 U.S. at 406.

**C. The district court found and the evidence proved that parental notice with a court bypass was substantially burdensome to minors; its effects included increased medical risks caused by delay and the trauma of going to court, deterioration of medical care, and forced teenage motherhood for some mature and "best interests" minors.**

The notification statute[10] was implemented on August 1, 1981, and as of March, 1986, 3,573 court petitions were filed by minors (64a), nearly one-half of all the minors seeking abortions. The district court found that although there was not "a systemic failure to provide a judicial bypass" in the most expeditious manner (53a), judicial bypass delayed minors by an average of two or three days just to get a court appointment, with a total delay of one week or more before their abortions. (56a-57a.) The court found these delays "unavoidable."[11] These delays forced some minors to have expensive,[12]

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10 The evidence proved that whether a statute requires parental notification or consent is irrelevant as they present equivalent burdens on minors. Indeed, in Minnesota, minors, parents, and medical personnel all use the terms notification and consent interchangeably. (152a-153a; 161a-162a; 164a; 168a.) A former Massachusetts judge testified in *Hodgson* that out of the 200 minors he saw pursuant to Massachusetts' law, (Mass. Gen. Laws, Chap. 112, 125S) which requires parental consent rather than parental notice, he could not recall one instance where the minor resorted to court after notice to the parents but where consent was refused. Minors went to court to avoid notice to the parents. (155a.)

11 A minor must first call a clinic to learn of her options. After this the teenager who chooses to go to court must call the court and get an appointment. Some counties have no sitting judges. (54a.) Class members Heather P. and Sharon L. had to wait two weeks and one and a half weeks respectively for abortions because of delay with court requirements. (158a-159a; 169a.) Three class members testified they were pushed into the second trimester, Cynthia J. and Bonnie L. (184a; 184a-188a); another was forced to go to Iowa with her mother. (167a-168a.)

12 A first trimester abortion averaged $225.00 (up to 12 weeks); a delay of even a few days raised this to $275.00 (12-14 weeks) for plaintiff minors. (178a.) For teenagers in the Duluth area, the delay also meant the additional cost of overnight travel to Minneapolis where second trimester abortions are performed. (178a.) There is no Medicaid funding for abortions in Minnesota. (167a-168a.) Teenagers were forced to hitchhike in the winter (166a-167a) and sleep in their cars. (183a.)

riskier[13] procedures, and the percentage of minors getting second trimester abortions increased.[14] The district court found that going to court produces "fear and tension" in minors, making them feel "guilty and ashamed." (58a.)[15] The court further found that some minors were so upset about going to court that they considered it more difficult than abortion and their anxiety affected the medical abortion itself. (58a.)[16] The court found the court bypass so daunting to some teenagers that some mature and best interest minors either notify, or forego the operation and carry to term. (58a.)[17]

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13 The district court found a one-week delay significantly increased medical risks. (56a-57a.) Dr. Willard Cates, former head of the Abortion Surveillance branch of the U.S. Centers for Disease Control, concludes that "delay [in getting an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion." Cates, *Adolescent Abortion in the United States*, 1 J. Adolescent Health Care, 18-25 (1980), p. 20.

14 Between 1978 and 1983 the percentage of minors obtaining second trimester abortions in Minnesota went from 18.4% to 23.0% (189a), an increase of 26.5%, statistics which an official from the Minnesota Department of Health, testifying as the state's witness, agreed was a public health problem. (156a-158a.) Furthermore, there is evidence that this number is increasing; Meadowbrook Women's Clinic, which does nearly all the second trimester abortions in the state, said as of December 1985; thirty percent of the minor patients were in the second trimester. (179a.)

15 The Director of the guardian *ad litem* program in Hennepin County who supervised or saw 2,264 minors who went through the court process testified that the teenagers are "very nervous, very scared. Some of them are terrified . . . [t]hey are often exhausted" and "feel like a criminal." (170a-171a.) One minor was scared literally speechless and turned mute. (182a.) Others vomit in court (176a), and one class member was aborting spontaneously in court and had to be accompanied by a nurse. (176a-177a.)

16 Some minors coming from court to the clinic have to be given sedatives (which were not given before this law) because of their vital signs from stress and pressure. (166a.)

17 Between 1981-1984 the rate of teenage childbirth in the city of Minneapolis went up *35.8%* for teenagers age 15-17 (190a), an increase compared to *.3%* for childbirths for 18-19 year olds (191a) who would be expected to share childbirth and abortion trends. (159a.) An

Further, medical care given minors who either went to court or faced notifying one or both parents, changed for the worse. The time pressures on minors, particularly those living outside of the two metropolitan areas where abortions are performed,[18] forced some physicians to forego using optimal medical procedures for the abortion. Insertion of laminaria, a technique which takes six hours, could not be used with court minors if the abortion had to be completed in one day because of time problems created by the court process. (182a-183a.)[19]

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epidemiologist employed by the Minneapolis Health Department attributed the disparity to the imposition of the parental notification law which affects only minors 17 and under. (154a.) The social, psychological economic and educational affects of teenage motherhood have been documented by this court. *Carey v. Population Services International*, 431 U.S. 678 (1977). It is 20 times safer in terms of mortality risks to have an early abortion as opposed to childbirth (LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 2 (1982), p. 191), and abortion at any stage of pregnancy is now safer than childbirth.

18 In Minnesota, no abortion providers are located in 82 out of 87 counties (45a), all abortion services are in the two metropolitan centers, Minneapolis and Duluth (46a), and out of 87 private and public hospitals in Minnesota, only two hospitals are generally open for abortion services. (45a-46a.) Because the farther a woman has to travel the less likely she is to get an abortion (47a), there is a great unmet need for abortion services in Minnesota. (159a-161a.) In general, women in Minnesota get abortions later than in the United States as a whole. Teenagers, who disproportionately receive second trimester abortions, can only receive such abortions in the Minneapolis-St. Paul area. (173a-174a.) Unfavorable publicity and bombings have dissuaded some Minnesota physicans from performing abortions. (49a.)

19 Plaintiff Dr. Jane Hodgson testified that although laminaria, a technique to dilate the cervix is usually used only for second trimester patients, she felt it was best medical practice to insert laminaria to dilate the cervix of some teenagers even in the first trimester because of their immature cervixes. (163a.) This could not be done for her teenage patients in Duluth who travel far to get to court, do not get through court until midafternoon, and must have their abortion and return home the same day. (164a-166a.) Dr. Hodgson was forced to choose between not using laminaria and not doing the procedure at all. (165a-166a.)

**D. The court found and the evidence proved particular burdens imposed by requiring both parents be notified; and by the waiting period imposed after mailed notice.**

Minn. Stat. § 144.343(3) requires that both biological parents be notified regardless of whether they are divorced, separated or never married, or whether there is an order of protection against one spouse because the family is one where violence is prevalent. The only exception is if the second parent cannot be located through "reasonably diligent effort," § 144.343(3). Because this is a criminal statute, requiring written proof verifying the representations of the minor, § 144.343(5), extraordinary delays were imposed on some minors in the course of obtaining such proof of compliance with the law.

For example, there was a two week delay in one case because the father initially refused to acknowledge paternity (163a-164a), and a two week delay in another case while waiting for a death certificate of the father to arrive from Massachusetts. (177a.) Further, the court found that many minors live in fear of violence, and are in fact victims of rape, incest or violence (81a); and that the exception for notice in the statute does not work for these minors. (59a.)

Only 50 percent of minors in Minnesota live with both biological parents. (80a.) The court found compelled notification of an abusive or disinterested absent parent in many divorce situations can "reintroduce" that parent's disruptive or unhelpful participation at a time of acute stress, and "provoke violence." (83a.) However, the law causes some minors who would naturally have told one parent not to do so because they had to go to court to avoid notice to the second parent. (85a.) Nonetheless, twenty to twenty-five percent of minors who go to court have notified one parent. (84a.) Many of those minors are accompanied to court by their mother, which the court found burdens both mother and daughter. (*Id.*) The court found the emotional trauma of the teenager and her mother who either go to court or notify an abusive father "tends to

interfere with and burdens parent-child communication, which the minor voluntarily initiated with the custodial parent." (62a.) The court held the law adversely affects voluntarily initiated communication in a large number of cases. (123a.)

Mailed notice to both parents involves a minimum of a 72 hour delay and the district court found the effective length of delay "may reach a week or more." (63a.)[20] The option is usually utilized to notify an absent parent, sometimes one the minor had never met. (163a-164a.)

**E. The district court found, upon review of five years of experience, that neither the parental notice law nor the judicial bypass system achieved any of state purposes they set out to do.**

The district court concluded ". . . [F]ive weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." (108a-109a.) In fact, besides being emotionally, medically, financially, and physically draining, the law was so burdensome some minors simply had unwanted children. (153a-154a.)

Out of the 3,593 petitions heard by Minnesota State Court judges, all but an "anomalous" nine[21] were granted on either "best interests" or "maturity" grounds. The state court judges who collectively heard over ninety percent of these cases testified at the trial, and none of them could identify any positive effect of the law. (69a.)[22] They did, however, all testify

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20 Because the Duluth Clinic is not open for abortions every day, mailed notice means a minor must often wait an entire week before the procedure can be performed, even when the minor has one parent's consent. (173a-174a.)

21 One minor was so scared about being in court she was rendered mute (182a); denial of her application was later reversed by the same judge. Other denials were in the first week of the law (67a), or because the minor wanted the denial. (65a.)

22 A former judge from Massachusetts testified that his experience with that state's parental consent law was identical to that of the judges in

as to the incredible stress inflicted on pregnant minors by going to court; one judge testified that a minor was so nervous her hands turned blue (71a); he also testified that the apprehension of the minors facing judicial approval was higher than in his trials involving child custody or orders for protection. (70a-71a.)

The bypass procedure completely failed to separate mature or best interests minors from immature non-best interest minors. (110a-111a.) The court found, based on expert testimony, testimony of the judges, and the statistics, that the statute "imposes the substantial burden of obtaining a judicial waiver of . . . notification . . . [on] a group of minors composed almost entirely of either mature . . ." or best interests minors. (112a.) The Court further rejected the possibility that the statute's very existence encouraged some immature non-best interest minors to notify their parents when they otherwise would not have done so. Based on expert testimony and statistics showing no increased notification after the law the court concluded that the statute does not have "any greater beneficial effect upon immature minors" than upon mature or best interest minors. (111a.)

The court concluded that the substantial burden imposed by § 144.343(2)-(7) "is not justified by the state's interests in encouraging intra-family communication and protecting immature minors because Minn. Stat. § 144.343(2)-(7) fails to further either of those interests in any meaningful way." (113a.)

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Minnesota. Although personally opposed to abortion for religious and moral reasons, he found all 200 minors appearing before him "mature." (155a.) He stated that the law ". . . just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion. . . ." (71a; 156a.)

## REASONS FOR GRANTING THE WRIT

### I. Because The Fully Developed Factual Record In *Hodgson* Conclusively Demonstrates That A Parental Notice, Waiting Period, And Judicial Bypass Scheme Undermines And Fails To Achieve Any Asserted State Interest, This Case Should Be Considered In Tandem With This Court's Review Of The Facial Validity Of The Mandatory Waiting Period In *Hartigan v. Zbaraz*.

This Court has granted writs of certiorari before judgment pursuant to 28 U.S.C. § 1254(1) and Rule 18 of the Rules of this Court, where many of the factual and legal issues presented by a petition are identical to those presented in a case already granted review and pending.[23] This Court has construed § 1254(1) to permit "any party," even the prevailing

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23 *United States v. Thomas*, 361 U.S. 950 (1960) (certiorari granted before judgment because the issues pending in *U.S. v. Raines*, 362 U.S. 17 (1960)) "are pertinent to the disposition of this case"); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (certiorari granted before judgment "because of the pendency here of *Greene v. McElroy*," 360 U.S. 474 (1959), which involved essentially the same important constitutional issues); *Brown v. Board of Education*, 344 U.S. 1, 3 (1952) (taking judicial notice of *Bolling v. Sharpe*, then pending in the Court of Appeals for the District of Columbia, and inviting the filing of a petition for certiorari before judgment in order to consider constitutional issues similar to those pending in other cases before the Court, which was subsequently granted, 344 U.S. 873 (1952)); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*," 328 U.S. 246 (1946)). *Cf. Fixa v. Heilberg*, 379 U.S. 997 (1965) (noting probable jurisdiction over case raising same issues as *Lamont v. Postmaster General*, 379 U.S. 926 (1965)). *See generally* Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed.) §§ 2.3, 4.20.

In addition, the Supreme Court has granted certiorari when there have been cases pending in the circuit courts with the same or similar issues. *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12, n.1 (1963); *Hannah v. Larche*, 363 U.S. 420, 422 n.3 (1960); *McElroy v. Guagliardo*, 361 U.S. 281, 283 (1960); *Reid v. Covert*, 354 U.S. 1, 5 (1957); *Graham & Foster v. Goodcell*, 282 U.S. 409, 415 n.2 (1931); *Johnson v. United States Shipping Board*, 280 U.S. 320, 25 (1930); *White v. Mechanics Securities Corp.*, 269 U.S. 283, 299 (1925).

party, to petition for certiorari before judgment so long as the losing party has appealed and the record is docketed therein. *E.g., Norman v. Baltimore & O.R. Co.*, 418 U.S. 683, 686-87 nn.1 and 2 (1974); *Youngstown v. Sawyer*, 343 U.S. 579 (1952); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935); *see* Stern, R., Gressman, E., and Shapiro, S., *Supreme Court Practice*, (6th Ed.) § 2.4 (1986).

This Court granted limited review in *Zbaraz* to consider the constitutionality of a 24 hour waiting period for all minors before an abortion following notification of both parents, where a judicial bypass procedure is provided on the face of the statute. 55 U.S.L.W. 3060 (U.S. October 14, 1986). The Minnesota court in *Hodgson* found a similar law unconstitutional based on a complete record demonstrating the actual burdens and striking absence of beneficial effect evident after five years of the statute in operation. (130a-131a.)

Both *Zbaraz* and *Hodgson* involve the constitutionality of a requirement that minors notify *both* parents before they may obtain an abortion. Both cases contain a mandatory waiting period following notification (24 and 48 hours respectively) in all or some circumstances and both cases involve statutes which appear on their face to provide minors with a judicial means of bypassing the notification requirement.

While the cases present many similar legal questions, they are different in one crucial respect. The *Zbaraz* case challenges the Illinois law on its face while the *Hodgson* decision determined that, but for this Court's decision in *Ashcroft*, the Minnesota law would be unconstitutional as applied after five years of operation. *See generally*, Point II, *infra*. The findings of fact made by the district court in Minnesota on a fully developed trial record offer a rare preview of the true effect of permitting the State of Illinois its requested "latitude" in "experiment[ing]" with the lives of pregnant minors within its borders. *See* Jurisdictional Statement of Appellant in *Zbaraz* at 11.

A determination of the facial validity of a 24 hour mandatory waiting period following notification of a proposed abortion to *both* parents of a pregnant minor necessarily depends upon facts which, if not present in the record, may be assumed by this Court. *See, e.g., H.L. v. Matheson*, 450 U.S. 388 (1981). In defending the constitutionality of laws such as those at issue here, a state must prove that they are necessary, narrowly tailored, and will actually serve state interests previously recognized as significant or compelling by this Court. *H.L. v. Matheson*, 450 U.S. at 413; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *review granted*, 55 U.S.L.W. 3247 (U.S. October 14, 1986); *see also City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983). Such conclusions of law necessarily rest on empirical facts about teenagers, their needs, their families and the effect of involuntary communication on family relationships and on the decision-making processes. Although both the decision of the Seventh Circuit and appellants' Jurisdictional Statement to this Court in *Zbaraz* rest on numerous factual assumptions, the *Zbaraz* case offers only a limited factual record upon which this Court may assess the accuracy of those assumptions.[24]

Indeed a close analysis of the state's Jurisdictional Statement in *Zbaraz* reveals its defense of the statute to be based upon many assumed facts which are directly counter to the record and findings of fact in the *Hodgson* case.[25] For example, the

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24 Of course the *Zbaraz* case is a facial challenge to the statute and thus there is only limited factual evidence as to the *actual* burdens and benefits of the statute in operation. As a general matter, a full factual record is advisable in determining constitutional questions of great public importance. *See e.g., Socialist Party v. Gilligan*, 406 U.S. 583 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 575 (1947); *Aircraft and Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 762-63 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945).

25 The *Hodgson* case is the first and so far the only challenge to a parental involvement and judicial bypass law in operation to be tried. *See generally*, Point II *infra*.

State of Illinois repeatedly contends that its notification and waiting period requirement are reasonable "means to attain the state's objective of protecting family integrity and ensuring a well-informed decision" to abort by a pregnant minor. *E.g.*, Jurisdictional Statement of Appellant in *Zbaraz* at 18. However, the District Court in *Hodgson* found the following:

> Defendants offered the Court no persuasive testimony upon which to base a finding that Minnesota's parental notification law enhances parent-child communications, or improves family relations generally. . . . The Court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity."

(78a-79a.)[26]

Further, Illinois presumes that minors subjected to its notification and waiting period requirements "have available to them avenues for by-passing notification. . . ." Jurisdictional Statement at 15. However, the district court in *Hodgson* found that "some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term." (58a.) Moreover, immature and non-best interest minors "rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents,

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26 *See also Adolescent Abortion: Psychological and Legal Issues.* Summary of Report, Interdivisional Committee on Adolescent Abortion, American Psychological Association. (192a.)

obtain an abortion outside Minnesota, or carry the pregnancy to term." (75a.)

Finally, the State of Illinois repeatedly attempts to justify its waiting period as a reasonable way to "assure that consultation will occur" following notification. *E.g.*, Jurisdictional Statement at 9. Yet the district court in Minnesota noted that inadvertent or involuntary communication has an "almost universally negative" effect, (78a) (quoting testimony of expert witness), and that a two parent notification requirement affirmatively discourages and damages parent-child consultation. (122a-124a) (regarding the law in general).

If the Illinois law were ever to go into effect,[27] it would likely create the same senseless non-beneficial burdens on the lives of minors and their families which Minnesota has witnessed. In determining the constitutionality of the Illinois law, and in necessarily assuming facts not in the record to that end, this Court should be mindful of the Minnesota experience and should therefore grant the instant petition to permit the cases to be considered in tandem.

## II. Whether Minnesota's Parental Notification Law Is Unconstitutional As Applied And Whether The District Court In *Hodgson* Erred In Concluding That *Planned Parenthood v. Ashcroft* Precludes Such A Conclusion Are Questions Of National Importance Necessitating Prompt Resolution By This Court.

Petitions for certiorari before judgment will be granted "upon a showing of imperative public importance." Supreme Court Rule 18; *see* U.S.C. § 1254(1). As this Court's decision to review the opinion of the Seventh Circuit in *Zbaraz* indicates, the issues presented in *Hodgson* are of such importance. Resolution of these issues should not await a decision by the Court of Appeals.[28]

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27 In *Zbaraz*, the Illinois law is challenged both on its face and in effect.

28 Certiorari before judgment has been granted in cases of great constitutional significance. *E.g.*, *Youngstown*, 343 U.S. 579 (1952);

## A. Minors' Notice and Consent Laws Have A Profound, Widespread and Irreparable Impact And Their Constitutionality Is An Issue of Imperative Public Importance.

The trial of the *Hodgson* case was the first time that a federal court "had occasion to consider the actual effect of a consent/bypass or notification/bypass statute in operation." (104a-105a; 115a.)[29] This opportunity came none too soon, because five weeks of testimony conclusively demonstrated that the judicial bypass option is indeed the nightmare envisioned by Justice Stevens in his opinion in *Bellotti v. Baird*, 443 U.S. 622 (1979). As predicted, "the need to commence judicial proceedings in order to obtain a legal abortion . . . impose[s] a burden at least as great as, and probably greater than, that imposed on the minor child by the need to [notify or] obtain the consent of a parent." 443 U.S. at 655 (Stevens, J. concurring) (footnote omitted).[30]

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*Carter v. Carter Coal Co.*, 298 U.S. 238, 285 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935).

Certiorari before judgment has also been granted in a variety of other cases presenting issues of extraordinary national importance. *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974); *United Mine Workers*, 330 U.S. at 269; *Ex Parte Quirin*, 317 U.S. 1, 18-19 (1942). *See generally*, Stern, Gressman and Shapiro, *Supreme Court Practices* at § 4.20.

29 All previous cases on a minor's right to choose which have reached this Court, for example, have involved statutes enjoined before or at the time they took effect, except *H.L. v. Matheson*, 450 U.S. at 405-406, which was attacked facially with no record. *See, e.g.*, *Akron*, 462 U.S. at 425 (enforcement of ordinance enjoined before effective date); *Planned Parenthood Association of Kansas City v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980) (statute at issue in *Ashcroft*, 462 U.S. 476 enjoined on day after becoming effective); *Bellotti*, 443 U.S. at 645 n.25 (statute enjoined before going into effect in "absence of any evidence as to the operation of judicial [bypass] proceedings. . . .").

30 The suggestion in *Bellotti* that a bypass procedure *might* remove the unconstitutional burdens imposed by mandatory consent was advisory in nature in that no such statute was before the Court at that time. *See Bellotti*, 443 U.S. at 656 n.4 (Stevens, J., concurring); *but see Ashcroft*, 462 U.S. at 479-480 in which such a law was before the Court.

Minnesota's experiment with a statutory scheme of the sort suggested in *Bellotti* and reviewed in *Ashcroft* has proved a dismal failure. It is painfully clear after trial that even a bypass procedure which was found *not* suffering from any failure other than that inherent in its operation,[31] delays and deters minors seeking to terminate pregnancy, (52a; 57a-58a), subjects them to emotional trauma, (62a), affirmatively discourages and interferes with voluntary communication, (61a-62a), and utterly fails to serve any of the interests which the state advances in an effort to justify the imposition of such substantial burdens on the exercise of a fundamental constitutional right. (112a-113a.)[32]

At present, twenty states have made similar attempts to experiment with state-mandated family communication.[33] Five states have not even attempted to comply with the facial guidelines of *Bellotti* and *Ashcroft* through the provision of a

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31 The district court found that the Minnesota bypass procedure was not suffering from systemic failure. (52a-53a.)

32 Moreover, as the district court found, there is some evidence that Minnesota actually intended the statute to have these effects. (68a.) (". . . a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature".)

33 *NOTIFICATION*: *Arizona*: Ariz. Rev. Stat. Ann. § 36-2152 (1986); *Idaho*: Idaho Code § 18-609(6) (Supp. 1986); *Illinois*: Ill. Ann. Stat. ch. 38 paras. 81-54.4, 81-64.4 (Smith-Hurd Supp. 1986); *Maryland*: Md. Health-Gen. Code Ann. § 20-102, 103 (1982); *Minnesota*: Minn. Stat. Ann. § 144.343 subd. 6 (West Supp. 1986); *Montana*: Mont. Code Ann. § 50-20-107 1985; *Nevada*: Nev. Rev. Stat. Ann. § 44.2 253 (Michie 1986); *Ohio*: Ohio Rev. Code Ann. § 2919.12 (Anderson Supp. 1985); *Utah*: Utah Code Ann. § 76-7-304 (1978); *West Virginia*: W. Va. Code § 16-2F-3(a) (1985). *CONSENT*: *Indiana*: Ind. Code Ann. § 35-1-58.5-2.5 (1983); *Kentucky*: Ky. Rev. Stat. Ann. § 311.732 (Michie/Bobbs-Merrill 1983); *Louisiana*: La.Rev. Stat. Ann. § 40:1299-35.5 (West Supp. 1986); *Massachusetts*: Mass. Gen. Laws Ann. Ch. 112, § 12S (West 1983); *Mississippi*: Mississippi Laws 1986, Leg. Sess., Ch. 448; *Missouri*: Mo. Ann. Stat. § 188.028 (Vernon 1983); *North Dakota*: N.D. Cent. Code § 14-02.1-03.1 (1981); *Pennsylvania*: 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); *Rhode Island*: R.I. Gen. Laws § 23-4.7-6 (1985); *South Carolina* S.C. Code Ann. § 44-41-30 (Law Co-op 1976).

judicial bypass procedure.[34] Of those which do have a bypass, seven are presently under court injunction for facial invalidity and these cases are pending in district courts and courts of appeals nationwide.[35]

In seven states bypass laws are actively being enforced.[36] Statistics for Minnesota and Massachusetts show that in those two states approximately seven to eight thousand minors have thus far been compelled to navigate a judicial obstacle course in order to exercise their fundamental rights.[37] While all but an anomalous few of these minors have been granted the right to obtain the confidential abortion which is their right, (65a), untold numbers of minors have carried to term, been delayed into the second trimester of pregnancy, traveled out of state,[38] or incurred family crises due to notification against their better judgment. (58a-59a.) At the same time it is clear that these judicial bypass procedures fail to separate mature from imma-

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34 Idaho, Maryland, Montana, South Carolina, and Utah.

35 Illinois: *Zbaraz v. Hartigan*, 584 F. Supp. 1482 (N.D. Ill. 1984), *Aff'd in part, rev'd in part*, 763 F.2d 1532 (7th Cir. 1985), *review granted*, 55 U.S.L.W. 3247 (U.S. October 14, 1986); Kentucky: *Eubanks v. Collins*, No. C82-0360-L(A) (W.D. Ky., July 10, 1986); Mississippi: *Barnes v. State of Mississippi*, No. 86-0458 (S.D. Miss., filed July ____, 1986); Nevada: *Glick v. McKay*, No. CV-R-85-331-BRT (D.C. Nev., June 17, 1986), No. 85-2335 (9th Cir., filed July 19, 1986); Ohio: *Akron Center for Reproductive Health v. Slaby*, 633 F. Supp. 1123 (N.D. Ohio 1986), *appeals docketed*, No. 86-3664 (6th Cir. ____, filed July 7, 1986) (appeal of State of Ohio), No. 36-3717 (6th Cir., filed , 1986) (appeal of Defendant Slaby); *Pennsylvania: American College of Obstetricians & Gynecologists v. Thornburg*, 737 F.2d 283 (3d Cir. 1984), 476 U.S. ____, 90 L.Ed. 2d 779, 106 S.Ct. ____ (1986); Utah: *L.R. v. Wilkinson*, Civ. No. C-80-0078J (D. Utah, July 23, 1984) (enjoined as to emancipated minors).

36 Minnesota (until November 6) and Massachusetts. Indiana, North Dakota, Missouri, Rhode Island, Louisiana.

37 In Minnesota 3,573 bypass petitions were filed from August 1, 1981 to March 1, 1986. (64a.) For the Massachusetts statistics *see* Donovan article cited *infra* note 38.

38 In Massachusetts, one third of the minors go out of state for abortions to avoid either notifying their parents or going to state court. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 6 (1983), p. 259.

ture minors, offer no counseling and result in an overall decrease in parent-child communication. (75a-77a.)

These laws are a daily catastrophe in the lives of pregnant minors. Their constitutionality is a perennial question in the federal courts as more and more states enact them. This Court will be asked to review the decisions of these lower courts in an endless parade of 'record-less' facial challenges already in the judicial pipeline.

Few statutory schemes adversely effect rights so important and yet so besieged. Few laws affect so profoundly and so permanently the lives of as many. And few legal questions are being considered by so vast a number of legislatures and courts at this very moment. Under such circumstances, the *Hodgson* court's erroneous conclusion that it was precluded from invalidating a law which it found to accomplish *no* state purpose after five years of operation, presents a question of imperative public importance necessitating prompt review by this Court.

**B. The District Courts' Conclusion That It Was Foreclosed from Invalidating the Minnesota Law As Applied Is An Issue of Public Importance Necessitating Prompt Review.**

The district court in *Hodgson* felt bound to reject petitioners' as applied challenge to the Minnesota law because of earlier decisions of this Court, despite a factual record resoundingly compelling a contrary result. (115a-116a.) ("[w]ere this court writing on a clean slate, it could not uphold the constitutionality of Minn. Stat. § 144.343(2)-(7). . . .").

The court relied on those cases which remind lower courts that they are not free to overrule Supreme Court cases or to disregard applicable precedent. *E.g*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd*, 460 U.S. 533, 535 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314, 1316 (1983). However, the Minnesota court was not faced with *applicable* precedent of this Court but was instead faced with rules of law set forth in *Bellotti* and *Ashcroft* based upon *facial* challenges and an utter absence of facts. *See Bellotti*, 443 U.S. at 656 (Stevens, J. concurring).

To hold Minnesota's parental notification law unconstitutional as applied based on its operating record is not equivalent to overruling or disregarding the principle that the Minnesota law may be constitutional on its face under *Bellotti* and *Ashcroft*. That the "as applied" record in *Hodgson* was to a great extent inconsistent with factual assumptions made without a comparable record by this Court in those cases, leads only to the conclusion that the rules of law set forth in those cases are inapplicable and do not determine the as applied constitutionality of Minnesota's law.[39]

The Minnesota court nevertheless concluded that it must reject petitioner's challenge to the bypass law "as a whole." (120a.) The court erroneously concluded that because the facial challenge to the Missouri statute reviewed in *Ashcroft* presented an issue purely of statutory construction, 462 U.S. at 491-92, the voluminous factual record and the astounding findings of fact set forth in its opinion are immaterial to determining the constitutionality of any post-*Ashcroft* bypass law. (115a-116a.) But the issue before the Court in *Ashcroft* was primarily one of statutory construction, because the statute had been enjoined *before* it went into effect and thus, there was no opportunity to develop a factual record such as the one developed in *Hodgson*.

By contrast, it cannot be disputed that the *real* effects of a law are critical to an assessment of its constitutionality when those effects can be detected and proved in a court of law. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). For example, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect," *Wright v. Council of the City of Empo-*

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39 Of course the concept that rules of law may lead to different results in different factual circumstances is part of the very fabric of our system of civil law.

*ria*, 407 U.S. 451, 462 (1972), and a statute must "measurably contribute[ ] to the . . . purposes which the State advances as justification for the" restrictive legislation. *Carey v. Population Services International*, 431 U.S. 678, 702 (1977) (White, J., concurring). Questions of whether a statute actually burdens the plaintiff class, *see Storer v. Brown*, 415 U.S. 724, 740 (1974), or substantially serves the asserted state interests, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151 (1980), have always been critical components of the strict scrutiny of state legislation which interferes with the exercise of fundamental rights.[40]

Because these are first and foremost factual inquiries, courts have invariably required a state defending such a law to come forward with *evidence* that the challenged statute *in fact* narrowly serves the purported state interests. *See Carey*, 431 U.S. at 696; *High Ol' Times, Inc. v. Busbee*, 456 F. Supp 1035 (N.D. Ga. 1978), *aff'd*, 621 F. 2d 141 (5th Cir. 1980); *see also Anderson v. Celebrezze*, 460 U.S. 780, 796-801 (1983); *Thomas v. Review Board*, 450 U.S., 707, 718-19 (1981); *Wengler*, 446 U.S. at 151-52; *Carey*, 431 U.S. at 696. In so doing, this Court has fastidiously examined the factual record proferred by the state in support of legislation which infringes on fundamental rights. *E.g.*, *Mississippi University for Women v. Hogan*, 458 U.S. 719, 730 (1982); *Craig v. Boren*, 429 U.S. 190, 200-03 (1976).[41]

Further, it cannot be disputed that a statute which is constitutional on its face may nevertheless be unconstitutional as applied. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 97 n.131 (1976); *Storer*, 415 U.S. at 740; *Euclid v. Ambler*, 272 U.S. 365, 395-97 (1926); *Alabama State Federation of Labor v.*

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40 *See, generally*, cases cited *supra* note 2.

41 "In general, 'constitutional litigation' demands fact analysis of the most particularized kind." Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75 . . . It is questionable whether assumptions and widely-held beliefs have a role to play in such analysis." *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3rd Cir. 1986); *see also In Re Gault*, 387 U.S. 1, 21-22 (1967).

*McAdory*, 325 U.S. at 461-62; *United States v. Salerno*, 794 F.2d 64, 788 (2d Cir. 1986) (Feinberg, C.J. dissenting). For example, in considering *Bellotti* as applied, which challenged the constitutionality of a Massachusetts law, the First Circuit noted that "a requirement unduly burdensome in operation [as to offend due process] will be struck down even if not clearly invalid on its face." *Planned Parenthood League of Massachusetts v. Belloti*, 641 F.2d 1005, 1011 (1st Cir. 1981) (review of preliminary injunction "on a record [as yet] undeveloped as to the actual operation of the judicial approval procedure"); *see also T.L.J. v. Ashcroft*, No. 830-4398-CV-C-5 (W.D. Mo. November 4, 1983) (as applied challenge to statute at issue in *Ashcroft* 462 U.S. 476).

Finally, it is clear that legislation which burdens a fundamental right may not be justified by "archaic and overbroad generalizations" unsupported by evidence of any kind. *See Hogan*, 458 U.S. at 730 n.16. As such, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Carolene Products*, 304 U.S. at 153; *see, e.g., In Re Gault*, 387 U.S. at 21-22 (1967); *Brown v. Board of Education*, 347 U.S. 483 (1954). *New Jersey Citizen Action*, 797 F.2d at 1260; Karst, note 40 *supra* at 108. Prior factual assumptions, particularly those made in the course of a facial challenge without a factual record, must be re-evaluated if they have changed or have become inapplicable in a particular context. *Cf. New Jersey Citizen Action*, 797 F.2d at 1257 (When fundamental rights are "patently burdened, the district court not only is free to, but indeed is required to overturn regulations that are premised on legislative assumptions contradicted by facts in the record").

The district court's conclusion that it was precluded from invalidating the Minnesota law "as a whole," flies in the face of these principles and of every known standard of constitutional review. To hold that the *real* empirical impact of a statute is without effect on the constitutional result is to place

precious civil liberties in jeopardy and to turn constitutional review into a formalistic exercise. These are issues of imperative public importance which would be unaltered by intervening consideration in the court of appeals.

## CONCLUSION

This Court should grant a Writ of Certiorari before Judgment and should consider the *Zbaraz* and *Hodgson* cases in tandem.

Respectfully submitted,

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